granting to him a limited administration pending the suit, but to some one presumed to be indifferent. 1 Williams on Ex'rs, 410. Nor, under our law, can either the next of kin, or creditors, claim a right to such appointment, if occupying an antagonistic relation to those who represent the deceased party. A temporary administration of this sort is not within the letter or spirit of the law prescribing to whom the general administration shall be committed; and it would seem singularly absurd to require that such special administration should be granted to a party whose interest, and perhaps whose first act would be to defeat the very purpose of the grant. Such is not the law.

There is no error in the record, and the judgment is affirmed.

Supreme Court of Texas. Galveston, 1854.

EDWARD RUSSELL'S HEIRS *vs.* HARVEY RANDOLPH.

1. A grant of land fraudulently obtained, is void *ab initio*, and no title passes to the grantee, nor is the land separated from the public domain, but remains subject to be located upon a valid certificate.
2. Domicil defined and considered.
3. Practice in the Land Office in Texas.

Allen & Hale, for Plaintiff in Error.

H. Yoakum, for Defendant in Error.

The opinion of the Court was delivered by

Lipscomb, J.—Edward Russell, the ancestor of the plaintiff in error, came to Texas some time in 1834, and the 21st day of August, 1835, obtained a grant for one league of land in the present county of Montgomery, and shortly thereafter left for the State of Maine, avowedly for the purpose of bringing out his family to settle upon the land conceded to him, and shortly after reaching his family in the State of Maine, where they had remained whilst he was in Texas, he died. In 1841 or '42, Mr. Norton with his family, his wife being a daughter of Edward Russell, cultivated and made a crop on the land, and they have resided ever since in the State of Texas.

In 1849, the defendant in error, H. Randolph, as assignee of Hugh Hampton, located a valid certificate issued to the said Hampton, on the said land so granted to Russell; and on the Surveyor refusing to survey the land for him, on the ground that the land pointed out and designated by him was covered by Russell's grant, brought this suit to try the right of the said heirs, alleging that it was a part of the public domain of the State of Texas, and subject to be located on by him in virtue of his certificate. The ground upon which the grant is attacked, is, that it was obtained by the fraudulent representations of the grantee, in representing himself as having come to the country with his family, when in truth he was only a transient person, and had not brought his family with him, and that his domicile was in the State of Maine. If the grant was so fraudulently obtained, and without authority of law, it was void *ab initio*, and never passed any title to the grantee, nor separated the land embraced in it from the public domain, and it remained subject to be located upon by any valid certificate. If, however, it was valid when it was issued, it could only be re-annexed to the public domain by forfeiture or by an abandonment of the country. (See *Holliman* vs. *Peebles*, 1 Texas, 676, and *Hancock* vs. *McKinney*, 7 Tex. 384.)

We will first inquire, whether from the facts the grantee ever acquired a domicile before or at the date of the issuance of the grant to him. This is a question on which there has been a great deal said, both by foreign and our own jurists. They have, however, agreed upon rules by which the question can be settled. The domicile of a man's birth is presumed to continue until he has selected another, but it is admitted that he can choose another domicile, and that he is not tied down to that of his birth. The evidence of such change of his domicile, or what will amount to such change, is not well defined. No precise time of residence at his new selection has been prescribed as necessary to constitute it as his domicile. If he has selected his new home with the intent of remaining, it would seem on authority to be sufficient, if he is actually at his new home. The intention without having gone there, or the going there without the intention of making it his residence will

not be sufficient. (See Story's Confl. Laws, §§ 44, 47.) The facts are shown to be that the grantee remained in the country from some time in 1834, until August or September, in the year following, and must have been here seven or eight months at least, before the title was extended to him. His declarations and acts all conduced to prove that his determination was fixed and final as to his residence. If he had acquired a residence here at the time of receiving his grant, as we believe, from the evidence he had, and returning to his original domicile, not with the view of remaining, but on business, such return would not forfeit the residence he had acquired here. If, however, when he left Texas for his native domicile, it was with the intent to remain there, he would forfeit his domicile here, and with it, the land acquired would, by abandonment of the country, revert to the public domain. There is no doubt from the evidence, that it was the continued intention of the grantee to return to Texas in as short a time as he could prepare to do so, and that he would have returned without any unnecessary delay, if his design had not been prevented by his early death while preparing to come back. By the Constitution of the Republic of Texas, section 10, it is provided, "All persons, Africans, the descendants of Africans, and Indians excepted, who were residing in Texas on the day of the declaration of independence, shall be considered citizens of the Republic, and entitled to all the privileges of such—all citizens now living in Texas who shall not have received their portion of land in like manner, as colonists shall be entitled to their land in the following proportion and manner. Every head of a family shall be entitled to one league and labor of land, &c." Under this provision it was decided that a married man who was in Texas at the date of the declaration of independence, but had not brought his family with him, but had left them in Mississippi, and afterwards went after them and brought them, was, on proof by facts that it was his intention to remove to Texas, entitled to one league of land and one labor. *The Republic* vs. *Young*, Dallam, 464.

In the *State* vs. *Skidmore*, 5 Texas Rep. 469, it was held that when the husband was in the Republic at the declaration of inde-

pendence, and returned soon after, and did not bring his family until near three years after, he was entitled to a league and labor of land upon his making proof that it was his intention to make Texas his permanent residence, when here, and to remove his family as soon as he conveniently could; and his wife's bad health accounted for his long delay. In these cases, the intention of the parties when here, without their families, of making Texas their permanent residence, and to bring their families, was construed to mean heads of families at the declaration of independence under the constitution. The principle of these cases is, that constructively their families were with them when the husbands acquired a residence in this country, and the principle is well explained by eminent jurisconsults, both American and foreign, that the domicile of the husband is the domicil of his wife and children. See Story, Conflict of Laws, § 44. The principle upon which the cases of Skidmore and Young were decided, are believed to be decisive of this case. If Russell, the grantee, had acquired a residence in Texas, *animo manendi*; constructively, his wife and children were here, too; because his residence by operation of law would also be their residence. And if he only left his new residence, and returned to his old, for a temporary purpose, either on business or on a visit, it did not annul the new residence; nor could it by his death so happening during his temporary absence, divest his heirs of the title to the land he had acquired as a colonist. The 31st article of the Colonization Law of the 28th April, 1832, is as follows: "Every new settler from the time of his settlement shall be permitted to dispose of his land, although it shall not be cultivated, by testament made in conformity to the laws that are now or shall hereafter be in force, and should he die intestate, his lawful heir or heirs shall succeed him in the enjoyment of his rights of property, assuming in both cases the obligations and conditions incumbent on the respective grantees." The same provision is found in the Colonization Law of 1825, by the same provision, and the Colonization Law of 1825 was not repealed as to Empresario Contracts entered into under it, but such contracts were expressly reserved in the Act of 1832. The conditions to be performed were all subsequent, and before any of

them could be required, to wit: in six or seven months from the date of the concession, a revolution intervened, and the Republic of Texas was established, and all these conditions were abolished, so far as single head right leagues were concerned, by the Act of Congress of 14th December, 1837. This was only the re-enactment of the Act of 1836, December 22, on the payment of the land dues. The record shows that these dues were paid. Hart, Digest, Article 1860. And although the heir may lose his right by a long continued absence and foreign domicile, a reasonable time ought to be allowed him to become a citizen or sell his lands. What this reasonable time should be, may be settled by analogy to the nine years given in subsequent legislation to absent heirs, to become citizens, or to sell the property of their ancestor. The Act of Congress of January, 1840. Hart, Dig. Art. 585, is as follows: "In making title to land by descent, it shall be no bar to a party that any ancestor through whom he derives his descent from the intestate is or hath been an alien. And every alien to whom land may be devised or may descend, shall have nine years to become a citizen of the Republic and take possession of such land, or shall have nine years to sell the same, before it can be declared forfeited, or before it shall be escheated to the Government." It was in evidence that Mrs. Norton, a daughter of Edward Russell, the grantee, with her family, made a crop upon the land in 1842, and have resided in Texas ever since.

The strongest evidence of fraud in procuring the title on the part of Russell, is his representation to the Commissioner in his application for the land. He states that he has come to Texas with his family, a wife and three children, when it is in evidence that his wife and children were not at that time in Texas; and if it was an indispensable requisite of the law, that they should have been actually with him, as a condition upon which title could be extended, it would seem, that it would make the grant void both on account of the fraud and for want of legal sanction. It seems, however, that if he had such family as he describes, that by the usages of the country, and the practice of the Commissioner in extending titles, the family were in law constructively with him. This is presumed

from the fact that the officers did so receive him, and as it was the duty of the Empresario and Commissioner to inquire into the qualifications of those offering themselves as colonists, the presumption, though not conclusive, is that they did not transcend their authority or violate their instructions.

Mr. Hotchkiss, a witness, swears that the grantee lived with him some time at his house at Nacogdoches; swears that the officers who extended titles to him, knew at the time that the wife and children were not actually with him, and that it was usual to issue titles under such circumstances, and that it had been sanctioned by the Attorney General and Assessor General. Mr. Rankin, whose affidavit is in the record, swears the practice to have been the same as proven by Mr. Hotchkiss; and that he had been surveyor in both Austin's and Vehlin's colonies, and that it was usual in both colonies. We have no doubt that in hundreds of cases it was done; the head of the family often preceding his wife and children, and making arrangements here, by selecting and procuring the land, and sometimes making a crop, or building cabins before the rest of the family would be brought out. The evidence of Mr. Hotchkiss was not objected to, and therefore cannot be objected to in this Court, as the instructions of the Assessor General would go to establish not only the practice, but would also tend to prove that it was authorized by the proper authorities; and the case of *Holliman* vs. *Peebles*, 1 Tex. 676, further confirms the fact of such being the practice of the country, at least. Were we to decide that this practice was a fraud and unauthorized by law, and the title so issued void, we might disturb hundreds of the grants obtained by the early settlers, and deprive them of their lands, for which they had encountered all the peril, toil, and privation to which the early settler was exposed. We believe, however, that if in this case Russell only went back to bring his wife and children, and would have brought them, had it not been for his early death, that his heirs are entitled to the land he had obtained.

The Court was requested, on the trial of this case by the attorney for the unknown heirs, to charge the jury:—"That if they believed from the evidence that Russell, the ancestor of the defendants,

applied for and obtained the grant in good faith, and in good faith went for his family, and died in his efforts to bring them to Texas, in pursuance of the grant, they will find for the defendants;" which charge the Court refused to give. In view of the evidence and the law on which we have commented, we believe the Court erred in refusing to give the charge prayed for.

The Court erred also in overruling the motion for a new trial, on the ground that the verdict was contrary to the evidence.

There is nothing in the grounds stated by the counsel for the appellee, in his motion to dismiss the writ of error in this case. We have no doubt but the attorney appointed by the Court to represent the heirs, had a right to bring the case up for revision.

For the above errors the judgment must be reversed, and the cause remanded for a new trial, in accordance with the opinion given by us.[1]

RECENT ENGLISH DECISION.

Vice-Chancellor Wood's Court.

SCOTT *vs.* BENTLEY.

1. Where a creditor had been found lunatic in Scotland, and a curator bonorum appointed there—Held, that such curator bonorum has alone a right to sue and give discharges for personal estate of the lunatic, in England.

2. The debtor, not disputing his liability, nor the amount due, but only the right to give a discharge, paid the amount into a bank:—Held, that this was equivalent to a declaration of trust, and that the curator bonorum was right in proceeding in equity.

The question in this case was as to the right of a curator bonorum of a lunatic in Scotland to receive personal estate in England, consisting of arrears of an annuity of 1300*l.*, secured on lands in England, with a covenant to pay the annuity, and a power to the

[1] We are indebted to one of the learned counsel concerned in this case, and are assured that the judgment is of much interest and importance in Texas.—[*Eds. A. L. Reg.*]